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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 702

W. C. PHILLIPS and FRED J. DAY, JR., Trustees,
Petitioners,
v.
GEORGE WALTER BAKER and MODERN PRECOOLING COMPANY, a partnership,
Respondents.

Petition for Review on Writ of Certiorari

To the United States Circuit Court of Appeals
For the Ninth Circuit

and

Brief in Support

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition of W. C. Phillips and Fred J. Day, Jr., Trustees, respectfully prays that, in accordance with the provisions of the United States Code, Title 28, Section 347(a), the United States Circuit Court of Appeals for the Ninth Circuit be required by writ

of certiorari issued by the Supreme Court of the United States, to certify to it for determination, the above identified case in which the decision of the said circuit court of appeals was rendered on July 18, 1941.

SUMMARY STATEMENT OF MATTER INVOLVED

Interpretation of Federal Rules of Civil Procedure, Rule 12.

The first question which petitioners ask to have reviewed and determined by this Court is whether the Federal Rules of Civil Procedure, Rule 12(h) (United States Code, Title 28, following Section 723c), forbids a defendant to raise in his answer, defenses which could have been raised and decided concurrently with other matters raised by motion.

This suit was commenced by petitioners, by the filing in the United States District Court for the Northern District of California, Northern Division, of a Complaint (Transcript; pages 1-3) charging infringement of Letters Patent of the United States. The defendants' first step was the filing of a Motion under the Federal Rules of Civil Procedure, Rule 12(e), for a more definite statement as to the apparatus the use of which was charged to constitute infringement, and as to the claims which were charged to be infringed. *No more definite statement with respect to the allegations establishing venue was asked for by this Motion.* Defendants thereafter filed an Answer (Transcript; page 4) in which they raised a defense of improper venue by denying the allegations of paragraphs II,

III, and IV of the Complaint. This was met by petitioner's contention that after bringing a Motion under Rule 12(e), without concurrently interposing the defense of improper venue as permitted by Rule 12(g), the defendants were forbidden to raise the defense of improper venue by the terms of Rule 12(h), reading as follows:

> "*Rule 12(h)* WAIVER OF DEFENSES
>
> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

The District Court, and the Circuit Court of Appeals, in an opinion (Transcript; pages 20-30) and also reported at 121 Fed. (2d) 752, held that Rule 12(h) should be interpreted, contrary to its plain language, so as to permit the defendants under these circumstances to raise the defense of improper venue in their answer.

Interpretation of United States Code, Title 28, Section 109.

The second question which petitioners ask to have reviewed and determined by this Court (in the event of an affirmance of the decision of the Circuit Court of Appeals on the first point), is whether the statute relating to the venue of actions arising under the patent laws of the United States (United States Code, Title 28, Section 109) should be so restrictively interpreted as to wholly exempt proprietors of businesses of an essentially transient character from suit except in the district of which they are inhabitants. This involves an interpretation, with respect to businesses of such an essentially transient character, of the scope and meaning of the phrase:

"regular and established place of business"

as it is used in the aforesaid statute, and no such interpretation has been made by any decision of this Court.

The Answer (Transcript; page 4) filed by respondents raised a defense of improper venue by denying that defendants had a regular and established place of business within the District in which suit was commenced; that they had committed the acts of infringement complained of within said District; and that they were inhabitants of said District.

The parties thereupon submitted the issue as to venue to the District Court for preliminary determination in accordance with the practice permitted by the Federal Rules of Civil Procedure, (Rule 12(d)), presenting the issue as to the proper interpretation of the scope and meaning of the phrase:

"regular and established place of business"

in the statute above identified, by stipulating (Transcript; pages 5-9) that respondents were not inhabitants of the District in which the suit was commenced, but that they had committed the acts charged to constitute infringement within the said District and that respondents' business was carried on in a manner described in detail in an Agreed Statement of Facts (Transcript; pages 6-9).

It was shown by this Agreed Statement of Facts that the Letters Patent of the United States upon which petitioners rely relates to improvements in portable "precooling" apparatus, used in cooling agricultural produce in refrigerator cars after they have been loaded and before they have been removed from the packing shed where they have been loaded; that there are a large number of widely separated agricultural districts in the United States in each of which "precooling" service, involving the use of apparatus of the character to which the patents in suit relate is required by shippers during only a few weeks of the year; that the respondents travel from one agricultural district to another each season furnishing complete "precooling" service to such shippers, securing business en route by personal solicitation of shippers at the premises of each shipper; and that the respondents convey their portable "precooling" apparatus from job to job in trucks owned by themselves, transacting en route all necessary business in connection with their operations. It was also shown by the agreed statement of facts that at the date of the commencement of the present suit, respondents were engaged in

"precooling" operations as above described, in the District in which suit was commenced and that the individual respondent George Walter Baker was personally served with the summons and complaint.

On this record the District Court held, in an Order (Transcript; pages 9-10) that neither of the respondents had a "regular and established place of business" within the District in which suit was commenced, and entered a Judgment of Dismissal (Transcript; pages 10-11) without prejudice.

This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, on the same ground, in an Opinion (Transcript; pages 20-30) officially reported at 121 Fed. (2d) 752; and its Decree (Transcript; page 31) was duly entered.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Interpretation of Federal Rules of Civil Procedure, Rule 12.

This case presents a question of general importance relating to the interpretation of the Federal Rules of Civil Procedure, which affects all litigation under these rules, and which has not been, but should be, settled by this Court.

The Circuit Court of Appeals for the Ninth Circuit has by interpretation, read into Rule 12(h) an exception in favor of defendants which is nowhere warranted by the plain language of this section of the rule. In doing so it has supererogated the function of

the Supreme Court of the United States which promulgated and which alone has power to amend the Federal Rules of Civil Procedure. If amendment by interpretation is to be permitted, adjudications effecting such amendment should, at the least, be specifically reviewed and approved by the Supreme Court of the United States.

Interpretation of United States Code, Title 28, Section 109.

The case also presents a question of general importance relating to the interpretation of the Federal statute defining proper venue in patent cases, which has not been, but should be, settled by this Court.

A review of the decision of the Circuit Court of Appeals for the Ninth Circuit is essential to prevent establishment as a precedent of its interpretation, under which an obvious means whereby infringers may completely evade the jurisdiction of the United States courts in many patent cases, and place great and unwarranted burdens upon patent owners in all patent cases, is given judicial sanction.

The Circuit Court of Appeals for the Ninth Circuit has decided the question presented by this case in a way which is submitted to be in conflict with the principles enunciated in relevant decisions of this Court, in holding that Section 48 of the Judicial Code (U.S.C. Title 28, Section 109) sets up *jurisdictional* requirements, whereas according to the decision of this Court in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, this section relates only to *venue*.

The Circuit Court of Appeals for the Ninth Circuit has, in its own opinion in this case, expressed doubt as to the scope of the jurisdiction of the District Court under an agreed state of the facts and should properly have certified the case to the Supreme Court of the United States for instructions as to the law relating thereto.

WHEREFORE YOUR PETITIONERS RESPECTFULLY PRAY that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the United States District Court for the Northern District of California, Northern Division be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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